land in a non-Malay, save as provided by the subsequent sections. Section 7 enacts that if a Malay attempts to vest his land in a manner contrary to section 6, the State Council may forfeit the land unless the transferor shews cause against forfeiture. Section 4 enables the State Council to revoke the declaration of a Malay Reservation, as to a part of the area, i.e. to excise a specified lot, at any time, on the application of any person.

The construction which, after consultation, the members of the Court put upon these provisions, read as a whole, is that a transfer to a non-Malay is not absolutely prohibited or necessarily void *ab initio;* the transferor risks forfeiture but he does not incur an automatic forfeiture; he is assured of a hearing and if he can satisfy the Council, they will not enforce the forfeiture and in such a case they will, presumably, excise the land from the Reservation.

On this construction it appears to be doubtful whether the Collector was bound to cancel the memorials of transfer under section 13 of the Titles Ordinance but that question does not require decision in this appeal. In fact he did cancel them, perhaps rightly, perhaps unnecessarily, but in either case the parties affected were entitled to appeal to the Commissioner, so the subsequent proceedings were well founded. Their technical details were criticised but only one point of substance emerged and the Court of Appeal were able to deal with it by hearing counsel, the necessary materials being on the record.

At the end of the hearing before the Delegate the occupation memorials were, in effect, off the register and he was seised of the facts; he could dismiss the appeal (in which case the registered interest reverted to the original vendor) or he could restore the memorials or order other memorials to be made, as the justice of the case required, as he directed himself soundly on the principals to be applied, there is no reason to disturb his decision, the effect of which is to put the non-Malay transferee back on to the register. This exhausts the effect of the Titles Ordinance. If nothing more were done there might be a deadlock but attention was drawn to the words: — "at any time" in section 4 of the Malay Reservations Enactment and to the fact that the State Council had not refused the transferee's application; they had merely adjourned it; there did not appear to be any reason, when the proceedings in the Courts were concluded, why the transferee should not renew his application to the State Council in which case they could deal with the land as they thought fit, under the Enactment.

In conclusion, it is to be emphasised that this judgment relates exclusively to land in Kedah and has no necessary application in the other States, some of whose corresponding laws are differently worded.

Spenser Wilkinson, J. : — I have read the judgment of the learned President. I agree and have nothing to add.

Wilson, J. : — I have read the judgment of the learned President and am in agreement with it.

Order accordingly.

REX v. BAKAR BIN SAHAT.

[Orig. Crim. Juris. (Spenser Wilkinson, J.)
October 23, 1951]

[Penang — Criminal Revision No. 15 of 1951]

Criminal Procedure Code, ss. 12(4) and 451 — Police supervision — No punishment imposed — Recall of witness afer close of defence.

The accused was convicted under ss. 511 and 456 of the Penal Code of an attempt to commit house breaking by night. Under s. 290 of the Criminal Procedure Code, the President of the Sessions Court after convicting the accused released him on a bond for $200 with one surety for 3 years and also directed that the accused be subject to police supervision for a period of one year. One of the witnesses for the prosecution was recalled after the close of the case for the defence.

Held, (1) that as the Court did not sentence the accused to any other punishment s. 12(4) did not apply and the order for police supervision could not, therefore, be made; (2) that s. 12(4) did not apply in this case because the second conviction of the accused was not an offence punishable with imprisonment of either description for a term of two years or upwards; (3) that the power conferred by s. 451 of the Criminal Procedure Code to recall witnesses should not be exercised after the close of the case for the defence without strong reasons.

Cases referred to :—

(1) *Public Prosecutor v. Ng Teck Chuan* K.L. — Miscellaneous Application No. 16 of 1947 (unreported).
(2) *Kee Seng Nee v. Rex* (1949) M.L.J. 210.
(3) *Balfour v. Public Prosecutor* (1949) M.L.J. Supp. 8.
(4) *Rex v. Day* (1940) 1 All E.R. 402.
(5) *Jacob v. Public Prosecutor* (1949) M.L.J. 70.

REVISION.

Cur. Adv. Vult.

Spenser Wilkinson, J. : — My attention has been drawn to this case on the question of the order for one year's police supervision.

The learned President convicted the accused and, under the provision of section 290 of the Criminal Procedure Code, released him on a bond to be of good behaviour.

It is to be observed that in Section 290 the Code uses the expression :—

"The Court may, instead of sentencing him at once to any punishment, direct that he be released . . . "

Section 12(4) of the Criminal Procedure Code provides that "a District Court may, in addition to any other punishment to which it may sentence him, direct that he shall be subject to the supervision of the police". In *Public Prosecutor v. Ng Teck Chuan*[1] it was held that binding over under section 294 of the F.M.S. Criminal Procedure Code was not a "punishment" and that as payment of compensation and costs under section 426 can only be ordered "in addition to any other punishment" such an order could not be made where the accused was only bound over. In my opinion the result of the similar wording in section 12(4) is that if no "punishment" is inflicted on the accused, no order for police supervision can be made. Where it is the intention of the Court to order police supervision it is essential that some punishment, however slight, should be imposed upon the accused first.

This, however, is not the sole ground upon which I am of opinion that the order for police supervision in this case cannot stand. The section only authorises police supervision where the second conviction is for an offence punishable with two years' imprisonment or upwards. Under the combined effect of sections 511 and 456 of the Penal Code the accused in this case had committed an offence punishable with only 18 months' imprisonment.

Another point arises out of this record. I desire to issue a word of warning with regard to the calling of witnesses after the close of the case for the defence. The following passage from the judgment in Kuala Lumpur Criminal Appeal No. 47 of 1949 (unreported) is relevant :—

"Although that section empowers a Court to call evidence 'at any time' there is a clear and distinct limitation upon this discretionary power. I have had occasion before to point out that although a section of the Code may give the Court a very wide discretion, such discretion must be exercised subject to such well-known legal principles as are applicable in each case. It has been laid down by the Court of Criminal Appeal in England that after the defence has been closed no further evidence should be called either by the Court or by either party unless the cause for such evidence is one which no human ingenuity could have foreseen (Rex v. Day 1940 1 All E.R. 402).

In *Kee Seng Nee v. Rex*[2] Murray-Aynsley, C.J. held where the Magistrate recalled certain prosecution witnesses after Counsel for the defence had addressed the Court that this was in the circumstances an irregularity and he quashed the conviction.

In *Balfour v. Public Prosecutor*[3] the Court of Criminal Appeal referred with approval to the case of *Rex v. Day*[4] and expressed the opinion that the calling of a witness after the close of the defence in that case by the trial judge, though not illegal, was a wrong exercise of discretion, and that the evidence ought to be excluded.

There is a digest in *(1949) M.L.J. 70*[5] of a decision of Callow, J. to the effect that the Court may call further evidence, even after the close of the defence, if the evidence appears essential to the just determination of the case, but it is not clear from this digest whether the case of *Rex v. Day*[4] was cited to the learned Judge and it may be there were special circumstances in that case which justified the calling of the evidence.

In *Kee Seng Nee v. Rex supra* Murray-Aynsley, C.J. said :—

"It is true the evidence so obtained did not amount to much but the Magistrate was presumably in some doubt before and he seems to have overcome his doubt by means which were not open to him."

This observation indicates the danger inherent in calling or recalling witnesses at the end of a trial.

In this particular case the learned President recalled the 1st Prosecution Witness to rebut a statement by the accused in cross-examination that the witness had previously arrested him for gaming. This statement of the accused certainly introduced new and unexpected matter, but whilst the recalling of the prosecution witness did no harm I rather doubt whether it really assisted in the determination of the case.

In view of the decisions above referred to Presidents and Magistrates will be well advised to exercise the power under section 451 of the Criminal Procedure Code of calling or recalling witnesses with caution and should hesitate to do so after the close of the case for the defence without strong reasons.

As section 452 of our Criminal Procedure Code is the same as section 426 of the Criminal Procedure Code of the Federated Malay States I must, following the previous decision above referred to, set aside the order for costs made against the accused.

The conviction and the order binding over the accused will stand, but the order of costs and the order directing police supervision must be set aside. If the costs have been paid they must be repaid to the accused.

Order accordingly.